IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1071 OF 2006

M/s.NIKHILESHWARA BUILDCON
INDIA Ltd. & Ors. ...Petitioners

V/s.
M/s.ISHWARA ENCLAVE COOPERATIVE
HOUSING SOCIETY Ltd. & Anr. ...Respondents

Shri.Shirish Gupte, Sr.Counsel with Shri.Chandnani i/b. Shri.H.V. Kode for Petitioners.
Shri.Chaitanya Pendse with Shri.A.D. Gangal for Respondent No.1.
Shri.Y.M. Nakhawa APP for the State.

CORAM : V.M. KANADE, J.

DATED : 23rd OCTOBER, 2007.

P.C:-

1. Heard learned counsel for the Petitioners, learned counsel for Respondent No.1 and APP for the State.

2. Brief facts which are relevant for the purpose of deciding this Petition are as under:-

Petitioner No.1 is a Public Limited Company. Petitioner No.2 is the Managing Director and Petitioner No.3 is the employee of Petitioner No.1. Petitioner No.4 is also the employee of Petitioner No.1. The Petitioner No.1 constructed a building known as " ISHWARA ENCLAVE" at

the plot of land bearing City Survey No.132/7 consisting of ground plus seven storeys. Petitioner No.1- Company sold said flats in the building by entering into an agreement with the flat purchasers. In the agreement Clause 24 stipulates that purchasers would have no claim save and except in respect of the premises hereby agreed to be sold to them and that all open spaces, stilt, parking spaces, lobbies, staircases, terrace, recreation spaces, etc., will remain the property of the Developer. Petitioner No.1 installed a cellular antenna on the eighth floor of the building and entered into an agreement with cellular company. Petitioner No.1 also converted stilt parking area into flats. Part of the terrace was sold to wife of Accused No.2/Petitioner No.2 and one flat in the stilt area was purchased by Accused No.1/Petitioner No.1. Respondent No.1 is a Co-operative Society which is registered under the provisions of Maharashtra Co-op. Societies Act. Members of the said Society who were also residents of the said building filed a private complaint against the Petitioners before the Metropolitan Magistrate alleging that the Petitioners had committed offences punishable U/s.11, 13 and 14 of the MOF Act. It was inter-alia alleged that though it was the duty of the Petitioner No.2 being a Chief Promoter of the Society of conveying land in favour of the Society, he had

deliberately avoided conveying the land and had committed breach of provisions of MOF Act. Several other allegations also were made. It was alleged that under MOF Act, terrace and stilt area belonged to the Society and builder had no right to sell terrace to any third party and that in spite of clear legal provision under the MOF Act, builder had sold part of the terrace to his wife and had converted stilt area which was meant for parking of cars into residential flats. It was also alleged that sanctioned plan was changed without the permission of the members of the Society. Learned Magistrate issued process against all the Accused. Petitioners challenged the said order of issuance of process by filing a revision application in the Sessions Court. This revision application was also dismissed and being aggrieved by the aforesaid two orders, Petitioners have filed this Petition U/s.482 of Cr.P.C. and under Article 227 of Constitution of India.

3. Shri. Shirish Gupte, learned Senior Counsel for the Petitioners submitted that revisional court had failed to exercise its jurisdiction U/s.396, 397 of Cr.P.C. He invited my attention to the impugned order wherein the revisional court has recorded finding that it was unable to consider merits of the case. He submitted that powers which can be

exercised by the Sessions Court were similar to those which are exercised by the High Court U/s.401 of Cr.P.C. He submitted that, therefore, the Sessions Court had refused to exercise jurisdiction vested in it by not examining case of the Petitioners on merits. He submitted that it was the duty of Sessions Court to see whether the Magistrate had applied his mind in issuing process in the face of documentary evidence which clearly established that the Petitioners herein were always ready and willing to convey the property in favour of the Society.

4. It is not possible to accept the submissions made by the learned counsel for the Petitioners. It is no doubt true that Sessions Court while exercising revisional jurisdiction vested in it U/s.396, 397 of Cr.P.C. also has the same power which are vested in the High Court U/s.401 of Cr.P.C. Perusal of the order indicates that revisional court has come to the conclusion that at this stage, it would not be possible to consider defence of the accused or to consider documentary evidence on record and, therefore, on that ground rejected the revision application. In my view, it cannot be stated that the Sessions Court had refused to exercise its revisional jurisdiction in rejecting application filed by the Petitioners herein.

5. Learned counsel for the Petitioners submitted that Apex Court in case of **State of Orissa V/s. Debendra Nath Padhi reported in 2005 SCC (Cri.) 415** had held that High Court while exercising its inherent jurisdiction could scrutinize and look into documents of unimpeachable character. Para 29 of the said judgment reads as under:-

> "Regarding the argument of the accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the High Court under Section 482 of the Code and Article 226 of the Constitution is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice within the parameters laid down in *Bhajan Lal case.*"

He invited my attention to various documents annexed to the petition. He submitted that those documents conclusively indicate that the Petitioners were always ready and willing to convey the property in favour of the Respondent No.1. He first invited my attention to a letter dated 24/09/2002 which was addressed by Managing Director of the Petitioner No.1 Company to the members of the Society in which members were

informed that First Meeting would be held on 13th October, 2002. He also invited my attention to the agenda of the said meeting wherein item No.6 has been mentioned and the said item pertains to authority given to the Committee to secure conveyance of the right, title and interest in the property in the name of the society from the promoter(builder). He also invited my attention to the letter dated 13/10/2002 wherein committee members had acknowledged having received original registration documents from the Chief Promoter/Developer. He also invited my attention to the letter dated 28th January, 2004 which was written by the Managing Director of the Petitioner No.1 Company to the Deputy Registrar of Co-operative Societies wherein it was stated that members of the Society had refused to co-operate in conveying the property in favour of the society. He then invited my attention to the second reminder sent to the Deputy Registrar, dated 2nd August, 2004 as also other correspondence in respect of same subject. He further submitted that these records clearly indicate that it was the members of the Society and more particularly, Committee Members who had neglected and refused to accept the offers of the Petitioners to convey the property in favour of the Society. He also submitted that suit had been filed on the original side of

this Court in respect of certain structures which are erected on the terrace wherein society asked declaration for demolition of said structure. He further submitted that dispute essentially between parties was of civil nature and this was a fit case for setting aside issuance of process by exercising inherent powers of the High Court U/s.401 of Cr.P.C.

6. On the other hand, Shri. Chaitanya Pendse, learned counsel for the Respondent No.1 submitted that offer of conveying property in favour of the Society was given by the builder as the builder wanted to convey the property after having sold half portion of terrace and after having committed various irregularities, more particularly, by converting stilts on the ground floor into flats. Learned counsel for the Petitioners submitted that, in fact, in the suit which was filed on the original side of this court, certain orders were passed by this court wherein builder was directed and permitted to sell these flats on the ground floor and further orders were passed by this court directing the builder to deposit entire consideration in the civil court. A further direction was given that the purchaser of the flat should be informed about the pendency of the dispute between the parties. Learned counsel for the Respondent No.1 pointed out that all these questions were disputed questions of fact which could not be looked into

and the Petitioners had a remedy of filing an application for discharge, this being warrant triable case by the Magistrate.

7. In my view, submissions made by the learned counsel for the Respondent No.1 will have to be accepted. It is no doubt true that there is documentary evidence on record, which clearly indicates that builder had offered his willingness to convey the property to the Society. On the other hand, this aspect of conveyance also is disputed. These aspects, therefore, cannot be gone into by this Court at this stage while exercising its inherent jurisdiction under Section 482 of Cr.P.C. It is open for the Petitioners to apply for discharge and point out to the Trial Court documentary evidence which has been cited before this Court. However, I agree that at this stage, it will not be possible to interfere with the issuance of process.

8. One another fact which has to be noted here that builder also has filed criminal complaints against the members of the Managing Committee which are pending in the Trial Court and all these matters will have to be dealt with by the Trial Court after evidence is led in all these complaints. It has to be borne in mind that Maharashtra Ownership Flats Act was brought into effect on 10th February, 1964. This Act was passed to

regulate promotion of the construction of sale and management and the transfer of flats on ownership basis. After it was brought to the notice of the Government that there was acute shortage of housing in several areas of Maharashtra and after it was brought to the notice of Government that apart from sundry abuses, several mal-practices are committed by builders and difficulties and allegations in respect of sale, management and transfer of flats taken on ownership basis was brought to its notice, Government of Maharashtra appointed a Committee to inquire into and report to the Government on several matters referred to in the said resolution and after Committee submitted its report, said Act was recommended and passed and accordingly, it was brought into force. By virtue of said Act, several duties and obligations were cast on these promoters and breach of certain obligations was made liable under various Sections of the said Act. Taking into consideration provisions of said Act, in my view, at this stage, it would not be appropriate to interfere with the issuance of process. Writ petition is dismissed and disposed of accordingly.

V.M. KANADE, J.